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**Graduated response beyond the copyright balance**

How the will to control the Internet increases uncertainty in the information society

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1. Introduction

Cultural industries contend that unauthorized uses, e.g. illegal file sharing, made possible by the development of the Internet, are damaging their functioning.Digitization takes control away from the rights holders and gives it to potential counterfeiters, but importantly also to citizens. The main threat from the cultural industries’ point of view is that reproducing and distributing content has become cheaper for consumers, while producing and marketing content remains costly and risky. Additionally, in our information-based society, the issue of copyright protection has increased in importance, as it is now relevant for more than just creators and the cultural industries. Such a situation has led to the reinforcement of the copyright law in most countries around the world. Graduated response is one of the latest and most interesting examples of how such an evolution took place.

**Graduated response: a new way of tackling copyright infringement**

The French HADOPI law was one of the first legislations to introduce graduated response language in national law, and is considered a landmark in the global trend of copyright enforcement policy-making. Although this paper aims at targeting graduated response in general, the HADOPI law provides a concrete and detailed basis throughout our argumentation.

Graduated response refers to a system of online copyright enforcement that is an alternative to the traditional procedure requiring individual judicial remedies against each infringer. The system is based on a principle of cooperation between rights holders and Internet Service Providers (ISPs), through which the former can notify the latter of potential infringement by their subscribers, and have increasingly severe measures taken against them. The core common measures consist in issuing an order for ISPs to impose technical measures – affecting access to and/or use of the Internet – on end-users.

The progressive enforcement process is often referred to as the “three strikes” approach. In France, rights holders initiate the graduated response procedure by monitoring P2P networks and filing an infringement report to the HADOPI Authority. If

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4 HADOPI stands for *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*.
5 In this paper, all given examples correspond to the French case, unless specified otherwise.
the HADOPI Authority considers that the suspected users’ activity breaches their legal obligation to secure their Internet access\textsuperscript{7}, it requests ISPs to identify their subscribers on the basis of the IP addresses collected and sends a first warning notice to the users (or more precisely to the Internet access subscribers) by email. This warning notice contains instructions about the existing technical means of securing one’s Internet access and the existing online offers where content can be accessed legally. If the users are suspected again of illegal downloading within a period of six months following this first notice, they can then receive one email and a registered letter. If their illegal activity is again observed within one year following the second warning notice, they are notified about the risk of criminal prosecution. The HADOPI Authority can then inform the public prosecutor, who decides whether to start the criminal prosecution under a simplified judicial procedure, i.e. either in front of a single judge with a contradictory debate, or as allowed by the so-called “ordonnance pénale” process, without a contradictory debate. The French HADOPI law introduces a new sanction, the suspension of Internet access.\textsuperscript{8}

**The promotion of a “legal offer”**

Graduated response solutions are supposed to not only discourage users to share online copyrighted content illegally, but also to encourage the development of online offers where content can be accessed legally. In this respect, the promotion of legal offers through the allocation of a certification to some Internet content services, is one of the HADOPI Authority’s main missions (Art. 331-13 § 1 *Code de la Propriété Intellectuelle, CPI*).

Online service providers of cultural content can ask the HADOPI Authority to grant them a certification demonstrating that the works offered to the public on their services are duly licensed by rights holders. The certification procedure, set out in an Application Decree\textsuperscript{9}, allows rights holders to oppose the certification request within a limited timeframe. In case of opposition from rights holders, service providers requesting the certification have to enter into licensing agreements with the complaining rights holders or remove the works concerned within a delay of two months. The certification is granted for one year, starting from the publication on the Authority's website. It can be renewed under the same conditions. The Authority can decide to withdraw the certification if the service providers do not comply with their obligations, in particular if the copyright licenses have not been obtained. Infringing rights for one single work can lead to the withdrawal of the certification for the whole service. These conditions can be

\textsuperscript{7} The 2006 DADVSI Act implementing the 2001 European Directive on Copyright in the Information Society (Art. L 336-3 CPI), introduced Internet users’ obligation to secure their own Internet access (sanctioned through the offense of “characterized negligence” or “négligence caractérisée”). This was further detailed in a Decree adopted on 25 June 2010.


\textsuperscript{9} Decree of 10 November 2010, enacted in Art. R. 331-47 to R. 331-54 CPI.
considered as guarantees to prevent the misleading use of certifications by services offering unlicensed content. All complete certification request files are published on <www.pur.fr>, a website managed by the HADOPI Authority\(^{10}\), which aims to help users "to choose legal cultural offers" and thus "to adopt practices that respect all creators and a responsible use of the Internet"\(^{11}\).

**Beyond HADOPI: graduated response in the world**

Elements of graduated response have been adopted by other jurisdictions, in particular relating to the "three strikes" approach. The UK 2010 Digital Economy Act includes some graduated response provisions, although Internet disconnection is not part of the British model. In Spain, the recently adopted Sinde Law ("Ley Sinde") allows the blocking of websites deemed to infringe copyright.\(^ {12}\) Legislations partially implementing graduated response mechanisms have also been discussed in New Zealand, South Korea and Taiwan. In the US, the Recording Industry Association of America and the Motion Picture Association of America reached an agreement with ISPs in the summer 2011 to create a "Center for Copyright Information" operating under a "five strikes" approach. This graduated response procedure does not result in Internet disconnection. New bills implementing Internet blocking approaches were also recently proposed in the US Congress: the "Stop-Online Piracy Act" (SOPA) in the House of Representatives, and the "Protect IP Act (PIPA) in the Senate\(^ {13}\).

Graduated response has been introduced in diverse policy forums, including in multilateral trade negotiations such as the Anti-Counterfeiting Trade Agreement (ACTA). The text of this agreement, which deals with the coordination of civil and criminal IPR enforcement measures between signatory States, has been highly criticized.\(^ {14}\) Furthermore, on the occasion of the reform of the European regulatory framework on telecoms and electronic communications ("Telecoms Package")\(^ {15}\), some provisions were included to allow Member States to adopt measures supporting the cooperation between ISPs and copyright holders.\(^ {16}\)

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\(^{10}\) "PUR" stands for "Promotion des Usages Responsables". It also sounds like "pure", i.e. "purified" from unauthorized content.


\(^{13}\) SOPA and PIPA have been shelved after significant protest from American civil society and technology companies. WASHINGTONPOST.COM. 2012. SOPA Bill Shelved After Global Protests from Google, Wikipedia and Others. January 20.


\(^{15}\) The EU "Telecoms Package" reform was adopted in 2009. It includes two directives and a regulation. OJEU of 18 December 2009, L 337.

Analyzed within the framework of a surveillance society, graduated response illustrates the global trend for more control over the Internet. The paper provides an in-depth analysis of the targeting of market players and Internet users through graduated response mechanisms, especially in the HADOPI Law. We argue that in seeking to regain control over the distribution and reproduction of copyrighted works, graduated response tips the balance towards copyright holders, with significant consequences for innovation in content-related industries and for the protection of fundamental rights. In addition, no study has considered both the repression and promotion sides of graduated response before. To do so, the paper relies on a multidisciplinary approach, confronting economic, legal and policy analyses.

In the remainder of the paper, section (2) analyzes the rationale of graduated response mechanisms. Based on a discourse advocating more control over copyrighted works, graduated response belongs to the global trend of surveillance in the information society. Section (3) analyzes the impact of graduated response on market players, in particular how graduated response questions the ISPs’ role and how the promotion of a legal offer can cause more uncertainty for online content service providers. Section (4) goes beyond market issues and considers graduated response’s impact on the citizens’ fundamental rights and freedoms. The paper concludes that while the real impact of graduated response is debatable, such enforcement policies and tactics instill a rejection of copyright in society.

2. Regaining control over copyrighted works

Surveillance and modern power
Graduated response depends heavily on surveillance. Rights holders are allowed to monitor networks for copyright infringements (see Section 4). Additionally, in France, the law obliges Internet account holders to secure their own Internet connection.17 Even before the passing of the HADOPI laws, rights holders sought permission of the French Data Protection Authority (CNIL) to monitor P2P networks, a request which was initially denied.18 In 2007, the French Council of State reversed this decision by CNIL,19 and surveillance was gradually introduced into French copyright policy. Overall, in the French graduated response system, the suspension of Internet access is much more objected than the surveillance of Internet activities.20

David Lyon defines surveillance as “the collection and processing of personal data, whether identifiable or not, for the purposes of influencing or managing those whose data have been garnereds”21. He argues that surveillance has two faces, care and control, and can be used in an enabling or a constraining way. Either way, as the second part of Lyon’s definition reveals, surveillance has the aim to influence or manage the surveilled. From this perspective then, surveillance is a means of social control. It is a tool to classify and control users on the Internet. On the basis of selected criteria, those

17 See footnote 7.
monitored are put in categories and a profile of them is built up.\footnote{CAMPBELL, J. \& CARLSON, M. 2002. Panopticon.com: Online Surveillance and the Commodification of Privacy. \textit{Journal of Broadcasting \& Electronic Media}, 42, 586.} Surveillance and classification valorize one viewpoint while silencing another.\footnote{LYON, D. (ed.) 2003. \textit{Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination}, London and New York: Routledge.} In graduated response, they reinforce the view that cultural works are first and foremost private property and give permission to copyright holders to monitor Internet use to enforce their rights.

Surveillance is not unique to graduated response. It is inherent to our information-based society. We monitor and classify information constantly to understand and make sense of the world around us. Both in our personal lives and in our economy, we seek to gather information to calculate and manage risks. Surveillance is often communicated as benign and beneficial for consumers, who allow surveillance for fear of missing out or being excluded. Indeed, surveillance is advocated as a means of averting risks. We are encouraged to give up a little privacy to protect against terrorism, to ensure the future of cultural production, or simply to get the latest great deals on the market.\footnote{MATTELART, A. 2010. \textit{The Globalization of Surveillance. The Origin of the Securitarian Order}, Cambridge \& Malden, Polity Press.} In the French policy, graduated response is communicated as a proportionate and mainly educational measure as it claims to give Internet users several chances to change their behavior and to provide an alternative to the harsh penal sanctions.\footnote{APC \& UFPI. 2008. \textit{Les Producteurs Indépendants de Films et de Musique Soutiennent la Démarche de la ‘Réponse Graduée’ qui Préservé le Droit de Propriété et les Libertés Individuelles. L’APC et l’UFPI Dénoncent les Manœuvres Visant à Empêcher la Création d’une Voie entre le Tout Répressif et le Tout Libéral sur Internet} [Online]. Available: http://www.ufpl.fr/index.php?page=presse&action=communiques&date=2008-09-25&com_id=52&PHPSESSID=42a069fd4b [Accessed February 27 2012], FRENCH MINISTRY OF CULTURE AND COMMUNICATION. 2010. \textit{Projet de Loi Création et Internet: Dossier Complet} [Online]. Available: http://www.culturecommunication.gouv.fr/Actualites/Dossiers/Projet-de-loi-Creation-et-internet-dossier-complet [Accessed February 27 2012].} Proponents of graduated response portray surveillance as a tool for care rather than control.

Graduated response as an answer to calls for more Internet regulation

Additionally, as the levels of copyright infringement remain high, alleviation of the lack of control over copyrighted works is sought through closer control over the architecture of the Internet through several national legal initiatives. However, this regulatory use of technology is not unique to copyright. Milton Mueller argues that intellectual property is bundled with other online issues such as security, privacy and child pornography to advocate for more Internet regulation. Linkages are made and alliances are formed to assert control over the Internet, often with intellectual property serving as the leading problem.  

There is a need to analyze the larger context in which Internet-related policies develop, as they collectively bear consequences for the future of the Internet and democracy - in particular for the freedoms of connection, access to information and expression. The ease of distributing information widely on the Internet is valuable to democracy, but equally creates challenges for copyright and other online issues. Dutton et al. argue that the potential of the Internet to enhance freedom of expression will diminish if it isn’t systematically addressed in policy and practice. Indeed, technology is not neutral, there are rationales and values embedded that change throughout its use and regulation.

Graduated response in France clearly advocates more Internet control. It relies on Internet Service Providers to execute the suspension of Internet access. Moreover, there is an acceptance to monitor the Internet and a willingness to experiment with technical restrictions. Throughout the graduated response policy-making process, the French President, the Ministry of Culture and Communication and cultural industries also described the Internet as a jungle, an “uncivilized” environment where only the fittest survive. The digital rights organization La Quadrature du Net contends that the French LOPPSI 2 Law, which contains provisions on homeland security (and also cyber-criminality), has been another government move in favour of national surveillance and Internet regulation. Finally, in May 2011, President Sarkozy placed Internet governance on the agenda of the G8, moving the debate away from its traditional international multi-stakeholder venue, the UN Internet Governance Forum, and towards a closed government forum. Here again, a “civilization” of the Internet through stronger


France’s 2011 LOPPSI Act (Loi d’Orientation et de Programmation pour la Performance de la Sécurité Intérieure) was passed in March 2011. The Law notably permits an administrative authority to order the blocking of Internet addresses containing pornographic depictions of minors.

national control was advocated.\textsuperscript{36}

Our first critique of graduated response consists in the fact that ultimately graduated response (with its dependency on surveillance) is not only about who controls copyright, but also who controls society & the Internet. It is more than a copyright enforcement effort. Although graduated response may not directly impact a citizen's ability to find a job, fill out an online tax form or gather information on upcoming elections, it fits within a wider trend of regulating and controlling the Internet. There is little room for reflection on the value of widespread access to information and privacy for democratic purposes in an approach advocating strong property rights and tampering with the architecture of the Internet. Policies developed to regain control over the distribution of information through throttling, blocking, filtering and more generally involving ISPs in enforcement, gradually chip away at the distributed and decentralized nature of the Internet.

3. From a will of control to an even greater uncertainty in the online content market

Graduated response illustrates the will of the State to introduce more control in a space seen as outlaw. The expected result is a market where rights holders are less negatively affected by unlawful services. The section briefly shows how promoters of the HADOPI law argue that efficiency is one of their key priorities, but they mainly accommodate the cultural industries. Indeed, the three strikes approach questions the role of ISPs. Moreover, the certification process of a “legal offer” could grant rights holders more bargaining power, while creating uncertainty for online service providers. This risks hindering innovation in legal services able to substitute illegal file sharing.

The debatable positive impact of graduated response

Efficiency is claimed to be one of the key priorities of graduated response.\textsuperscript{37} In reality, it can lead to significant costs.\textsuperscript{38} Do the positive effects of graduated response justify the costs? On the one hand, the 2009 “HADOPI 2” impact assessment contends that graduated response is viable due to the importance of the impact of illegal downloading on the cultural industries in the French economy (a loss of €1.2 bln), and thus of its impact on the State’s tax revenues.\textsuperscript{39} However, so far no visible impact of the implementation of the graduated response on the cultural industries or the State’s tax revenues could be demonstrated. Additionally, there are ways other than peer-to-peer systems to share content which are not tackled by HADOPI, e.g. specialized hosting companies (like Rapidshare), streaming services, etc. Contrary to its claimed purpose,

\textsuperscript{36} NYTIMES.COM. 2011. G-8 Leaders to Call for Tighter Internet Regulation. \textit{NYTimes}, May 25.

\textsuperscript{37} The figures provided by the HADOPI are somewhat impressive, even compared to what the promoters of the law envisaged before its adoption. For example, the impact study commissioned by the French government on the “HADOPI 2” legislative Bill forecasted 10,000 warning notices to be sent to web users every month. FRENCH REPUBLIC 2009. Projet de Loi Relatif à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet. Etude d’Impact. Paris: French Republic. However, from October to June 2010, they amounted to almost 55,000 every month. HADOPI 2011. Rapport d’Activité 2010. Paris: Hadopi.

\textsuperscript{38} In France, the HADOPI Authority alone has a yearly budget of €12 mln. HADOPI 2011. Rapport d’Activité 2010. Paris: Hadopi. It is not completely clear to which extent it includes e.g. implementation costs or compensation to the ISPs for their technical efforts to collect their subscribers’ IP traffic data. Another source of public spending relates to the recourse to the judge for sanctioning the infringing users.

graduated response thus creates a high incentive for innovation that facilitates bypassing the regulation, e.g. the development and use of encryption technology and anonymizing technologies.\textsuperscript{40}

On the other hand, in requesting active cooperation from ISPs, the graduated response challenges the balance achieved by most national legislations on the limitation of liability of ISPs. “Safe harbor” and non-monitoring provisions have been part of the EU Law since the EU Electronic Commerce Directive (2000/31/EC) setting the “no general obligation to monitor”, which prevents Member States from imposing a monitoring obligation on ISPs with respect to obligations of a general nature (Article 15). This legal \textit{acquis} (i.e. established norms), however, is jeopardized by diverse attempts to ask network providers to cooperate actively as a “copyright police”. For example, French law (article L. 335-7 CPI) stipulates that ISPs who do not comply with the obligation to disconnect the concerned user, risk a penalty of 5.000 Euros. Furthermore, the legislative developments in Spain and the US advocate blocking infringing content.\textsuperscript{41} As argued in section 2, copyright enforcement efforts are shifting to the use of Internet technology - and thus to the involvement of Internet service providers - to regulate.

The possibility to share content without asking for the rights holders’ authorization has had a positive impact on the roll-out of broadband connections. In fact, subscribers are willing to pay more for their Internet access, because they foresee savings due to free access to content.\textsuperscript{42} The money saved by users infringing copyright may be spent for other purposes, e.g. other entertainment products, technological devices.\textsuperscript{43} In other words, there have been revenue transfers from the cultural industries towards Internet and technology industries. The legitimacy issue here concerns the fact that targeting Internet users is used to solve an industrial problem.

\textbf{Promoting a “legal offer” at the expense of online content services?}
Like the graduated response mechanism, the certification of a legal offer\textsuperscript{44} targets the consumers, here by guiding their choices. Few studies so far have considered the connection between the sanction aspect of the graduated response and its market promotion counterpart.

The promotion of a ”legal offer” at first sight appears beneficial for online content services (e.g. VOD services, music streaming services), since it consists in granting a label to those respecting copyright, i.e. providing licensed content. The certification process aims at reducing the uncertainty to use such services. Thus, the \texttt{<www.pur.fr>} website argues that the PUR label facilitates users to identify legal services.\textsuperscript{45} However for online content services, the certification process is likely to increase transaction costs related to the licensing of rights, i.e. all costs related to searching for the identity of rights holders, bargaining license fees, and enforcing the agreement.\textsuperscript{46} Transaction Cost

\begin{thebibliography}{99}
\bibitem{41} See section 1.
\bibitem{44} See section 1 for a detailed explanation of the certification process under the HADOPI Law.
\end{thebibliography}
theory stipulates that the level of uncertainty has a direct impact on transaction costs: the higher the uncertainty, the higher the transaction costs.\textsuperscript{47}

As online content services and markets are still nascent, the certification process tends to add uncertainty in the digital economy. The definition of the legality of services is in fact far from being obvious. In the digital environment, the swift development of unlawful activities is perpetually re-shaping the established legal framework and the boundaries of what shall be deemed legal. While distinguishing “legal” from “illegal” services implies drawing a line between two categories of services, such a line appears to be blurred by the reality of the online market. Business practices show that legality cannot be a consistent notion over time, especially in the fast-changing digital environment. Rights holders tend to ask for regular revisions of licensing terms and commercial conditions, thus affecting the consistent development of licensed services. Moreover, total legality implies licenses with all rights holders, without any exception. For example, does a music service need a license with one record company or with all of them, and with all rights holders represented by the corresponding collecting societies in order to be legal? The HADOPI system does not bring more clarity in the fragmentation of rights and “rights managers”.

Additionally, the certification process has an impact on the development of online content markets by providing a competitive advantage to some players. Indeed, consumers are incited to use such services to avoid suspension of their Internet connection. The HADOPI certification is thus an important stake for professionals taking part in the digital market of cultural content. The certification process also gives considerable bargaining power to rights holders – in particular to those who own or manage a significant amount of rights. They might require service providers to obtain a label before entering into licensing negotiations. This requirement could even be part of the written provisions of the licensing contract and be invoked by investors wishing to secure their money. As a consequence, an HADOPI certification could create derivative obligations to be borne by service providers wishing to succeed in their business.\textsuperscript{48} The certification of a “legal offer” puts additional pressure on online services, adding uncertainty as to whether the service will get or keep its label, which is important in its bargaining process with rights holders.

Finally, the certification process also raises questions in terms of the liability of the HADOPI Authority itself. The economic impact on the online content provider would be significant if HADOPI rejected a certification. Whether an online content provider facing a certification dismissal could appeal the Authority’s decision in court (using for instance a competition law defense) is still uncertain.

4. The impact of graduated response on citizens: pedagogy, privacy and fundamental rights

As an instrument of control, graduated response has a significant impact on citizens. Control takes the form of a graduated approach (“three strikes”) with the purpose of a claimed pedagogy. The whole mechanism is presented as being designed to prevent rather than punish copyright infringement. In the process, graduated response shows


the evolution of copyright law towards more privacy invasive enforcement policies. Fundamental rights may be at stake.

**The rationale of pedagogy: increased probability of detection**

The economic purpose of copyright enforcement legislation is to raise the cost of copyright infringement for Internet users. Following the rationale of the law, the behaviour of the end-user when choosing whether to infringe copyright is determined by the perceived probability of being caught multiplied by the amount of the fine.49

Prior to the HADOPI Law, the focus of legislation was on introducing a scale of increasing sanctions and fines to deter copyright infringement. The threat had to be important enough to make end-users stop illegally sharing protected content. However, the probability of being caught was too low to make the threat sound realistic for common people. Additionally, technology savvy users could use tools to circumvent detection. Most importantly, the sanction appeared unfair, as only a few people were targeted whereas a huge share of the population was behaving similarly without being caught.

The aim of the graduated mechanism was precisely to tackle this issue by increasing the perceived probability of being targeted by sanctioning measures. Firstly, infringing users receive warning notices, which should make them stop sharing. The lapse of time between warning notices allows infringing users to change their behaviour.50 This is the core of the three strikes approach. Secondly, a huge campaign was designed to raise awareness among French citizens about graduated response and alternative “legal offers”. The campaign consisted in advertisements broadcast on almost all TV channels, on the radio, on posters, in newspapers and magazines, on the Internet, through leaflets, etc.51

**The "copyright exception" to the principle of private data protection**

Graduated response based upon the prior monitoring of users’ traffic data, it is in itself an exception to the principle of private data protection. The specificity of the system departs from the general legal framework allowing such exceptions, and further questions the impact on human rights and fundamental freedoms.

The protection of privacy and personal data is a general European law principle implemented in the online environment.52 As an exception to the principle, Member States can withdraw the protection of data to allow criminal investigations or to safeguard national security, defense and public security. Such action can only be taken where it constitutes a "necessary, appropriate and proportionate measure within a democratic society"53. The prevention, investigation, detection and prosecution of criminal offences thus allow Member States to depart from the general principle of data protection on the basis of their national criminal law, which includes intellectual property rights enforcement measures. The Directive lays down provisions for the retention of data, which remains exceptional and subjected to strict conditions. In the

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51 Ibid.


particular circumstances of private interests (such as copyright interests) guiding the exception to the fundamental right of protection of personal data, the respect of such provisions deserves high scrutiny. According to the general legal framework, personal data associated with IP addresses should only be disclosed in the course of a judicial investigation or for public safety reasons.

Nonetheless, copyright interests have motivated several initiatives for the processing of traffic data. In France, the collection and retention of data related to electronic communications is permitted by law on behalf of copyright holders. The 2004 Act on Privacy and Electronic Communications allows mandated organisms to monitor and collect traffic data, to be communicated to some identified rights holders representatives such as collecting societies, following the approval from the CNIL and under the limited terms of the exception to the data protection principle.

Graduated response mechanisms based on the collection of traffic data of suspected illegal downloaders, such as HADOPI, go beyond the general legal framework regulating electronic communications. This divergence from the European legal acquis, however, lacks objective justification. Even before being faced with any sanctioning measure part of the graduated response system, citizens are subjected to consequences affecting their right to protection of privacy and personal data.

An ad hoc procedure with a risk of double sanction...
Graduated response not only widens the exception for monitoring and collecting private data, it creates a specific procedure questioning the crucial role of the judicial authority. In this procedure, the fundamental rights to freedom of expression, presumption of innocence and due process are also affected.

Promoters of the HADOPI Law aim to simplify the copyright enforcement criminal procedure for the purpose of relieving congested courts and reducing the risks for

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54 See the interpretation of the concept of personal data in the EU Article 29 Data Protection Working Party Opinion 4/2007, adopted on 20 June 2007, which considers IP addresses as personal data.
56 Act of 6 August 2004 amending the 1978 Act on Data Protection and Freedom of Information (“Loi Informatique et Libertés”). The French Constitutional Council (Opinion of 29 July 2004) validated the exception to the data protection principle, provided that the collected data would only lead to personal identification under a judicial procedure and following the authorization procedure supervised by the CNIL.
57 On the basis of these provisions, CNIL approved the data processing system proposed by video games producers (SELL decision, 11 April 2005), but rejected the solution put forward by music authors and producers representatives (SACEM/SDRM/SCCP/SPPF decision, 18 October 2005). The French Council of State reversed this CNIL decision. See section 2 and also LORRAIN, A.-C. & MATHIAS, G. 2005. Données de Connexion: Un Etat des Lieux ou Une Première Tentative de Démêlage de la Toile Législative. Revue Lamy Droit de l’Immatériel, 11, 48.
58 The implementation of the graduated response in France has already given rise to some critical scrutiny from the national Data Protection Authority (CNIL), who sent warning notices to copyright holders (the collecting societies mandated to monitor traffic data under the HADOPI law) and to their subcontractor (TMG, a company in charge of the technical monitoring of traffic data) for breach of the legal preconditions regarding the data retention and for shortfall of the security measures surrounding the retention. See FRENCH DATA PROTECTION AUTHORITY (CNIL). 2011. Dispositif de “Réponse Graduée” : la CNIL Met en Demeure les Sociétés de Perception et de Répartition des Droits d’Auteurs et leur Sous-Traitant, TMG. [Online]. Available: http://www.cnil.fr/la-cnil/actu-cnil/article/article/dispositif-de-reponse-graduee-la-cnil-met-en-demeure-les-societes-de-perception-et-de-repa/ [Accessed February 27 2012].
individual infringers. However, the HADOPI Law has resulted in a specific procedure bypassing the legal guarantees granted under the judicial procedure. With the creation of a dedicated independent public Authority, the French legislator has left it to a non-judicial authority to initiate procedures against individuals. Judicial authorities are able to intervene only at a late stage in the procedure, if users are still suspected of infringing activities after having received two waves of notices on the basis of collected traffic data, and if the HADOPI Authority has decided to initiate the judicial procedure. The possibility for users to contest the decision taken by the HADOPI Authority and then the decision by the judge raises serious concerns.

One of the most controversial innovations of the HADOPI Law is the provision of a complementary sanction, adding to the criminal penalties, consisting in disconnecting users’ Internet access. The suspension of Internet connection can be decided for a period of up to one year, doubled with a prohibition to subscribe to another Internet access provider, while continuing to pay for the disconnected subscription contract. Although it would be consistent with the distinction made between commercial and non-commercial activities to differentiate between the sanctions applied to individuals, such a gradation is not taken into consideration by the HADOPI law.

This procedure is likely to lead to a double sanction to be borne by users. Indeed, the new specific sanctions created by the HADOPI Law are applicable, while the usual copyright infringement measures towards individuals (Art. L. 335-2 CPI: three years imprisonment and 300,000 Euros fine) still remain in force. Therefore, rather than proposing an alternative and less severe sanctions, the HADOPI Law is adding sanctions to the copyright enforcement system, or at least is it threatening to do so. (The HADOPI Authority recently announced that it entered into the last phase of its procedure and has informed the judicial authority of some persistent cases of suspected illegal downstream loading.) It is not the sanctions as such that generate most criticism, but rather the whole ad hoc procedure put in place.

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61 Article L. 335-7 CPI further provides that if ISPs do not comply with the obligation to disconnect the concerned user, they risk a penalty of 5,000 Euros.
64 The Constitutional Council underlined such a risk of double sanction in its censorship decision targeting the “HADOPI 1” Act (decision of 10 June 2009).
... Challenging the balance between the protection of copyright interests and fundamental rights

HADOPI is a “carrot-and-stick-and-gun” solution threatening the balance between the protection of proprietary rights and the protection of fundamental rights and freedoms. The French Constitutional Council censored the “HADOPI 1” Act on the basis of a disproportionate restriction on freedom of expression and communication, and for breach of the principle of presumption of innocence in criminal matters.67

Furthermore, the European Court of Justice ruled that measures consisting of copyright holders asking ISPs to transmit the IP addresses of suspected illegal downloaders, needed to “reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.”68 The Court concluded that the Member States must rely on an interpretation which allows a “fair balance to be struck between the various fundamental rights protected by the Community legal order”, in a way that does not conflict with general EU principles such as the principle of proportionality.69

This European jurisprudence has been reaffirmed in more practical terms. In the SABAM case70, the European Court of Justice ruled that the obligation to install general filtering systems covering all subscribers of an ISP, in order to prevent the unlawful use of copyrighted works, would not respect the prohibition to impose a general obligation on ISPs to monitor71, nor the requirement that a fair balance be struck between the protection of copyright, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.72

Finally, the EU “Telecoms Package” is the only European-wide legal framework applicable to graduated response solutions. Following an animated discussion about the possible sanctions to be administrated to end-users, notably regarding their access to and use of digital services, a compromise was finally found to guarantee a minimum protection of fundamental rights and freedoms, although the final version of the text fails to clearly establish the judicial procedure as one of the main guarantees.73 Article 1(3)a of the 2002/21/EC “Framework Directive” (as modified by Directive 2009/140/EC and its famous Amendment 138, sometimes presented as the “new Internet freedom provision”) provides minimum conditions to be applied to measures regarding end-users’ access to or use of online service. Any restriction has to be proportionate and necessary, on the basis of the principle of presumption of innocence, of the right to due process and of the right to privacy, in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the general principles of Community law.

67 See Constitutional Court decision of 10 June 2009, esp. §§ 16 and 18.
68 EUCJ, 29 January 2006, Promusicae v. Telefónica, Case C-275/06.
70 EUCJ, 24 November 2011, SABAM v. Scarlet, Case C-70/10 (concerning an internet access provider) and EUCJ, 16 February 2012, SABAM v. Netlog, Case C-360/10 (concerning a social network hosting service).
71 E-Commerce Directive, Art. 15.
72 VAN ASBROECK, B. & COCK, M. 2012. The Scarlet Case. ISPs Cannot be Ordered to Introduce General Filters on Their Network to Prevent Copyright Infringement. AmCham Connect. Brussels: American Chamber of Commerce in Belgium.
5. Conclusion

The aim of the paper has been to analyze graduated response and its impact on market players as well as on Internet users. Importantly, the paper showed that graduated response is a policy designed to regain control over copyrighted works, but also to control the Internet. For this purpose, it focused on the “three strikes” approach and the promotion of a “legal offer”, which are in fact two sides of the same coin.

After briefly describing the graduated response mechanism, the paper analyzed how graduated response is part of a wider framework of a surveillance society and increased Internet regulation. In graduated response, surveillance is used as a tool for social power, seeking to change web users’ behavior and endorsing rights holders’ views of copyright control. Graduated response also steps away from a distributed and decentralized Internet in favor of “civilization” and control. Furthermore, the paper argued that graduated response instills ambiguity and uncertainty on the online content market, at the expense of ISPs and online content providers. On the one hand, in requesting active cooperation from ISPs, the graduated response challenges the balance achieved by most national legislations on the limitation of liability of ISPs. On the other hand, the certification process behind the promotion of a “legal offer” could create derivative obligations to be born by service providers wishing to succeed in their business. Finally, the paper discussed the impact of graduated response on citizens. The HADOPI Law is described as pedagogical, with the emphasis on preventing rather than punishing illegal file-sharing. Nonetheless, the specificity of graduated response solutions raises criticism on copyright enforcement policies to unprecedented levels. The specific procedure put in place bears the risk of double sanction targeting infringing users. Most of the functioning of the law raises serious issues in terms of judicial control, and in terms of balance with privacy and other fundamental rights.

With the threat of monitoring or disconnection, web users find themselves in a position changing the way they access to and use the Internet. The risk is that such downsides of graduated response lead to a social rejection of copyright. As copyright law used to be directed towards professionals, it did not aim at having any direct impact on consumers, who then did not have to know anything or feel concerned about copyright. With the increase of copyright infringement, most policy-makers, supported by most rights holders, have reformed copyright laws to target consumers as efficiently as possible, using tools such as HADOPI. Massive copyright infringement and its subsequent copyright enforcement policies have led to a wide questioning of the social and economic relevance of copyright in a digital environment. As more people become aware about the negative impact of copyright enforcement policies, they may reject the copyright institution as a whole. This trend is already tangible. The growing role of civil society in the copyright law debate can be observed, as was recently illustrated in the US, where the adoption of two legislative acts (SOPA and PIPA) was postponed following strong opposition from civil rights groups.

Policies for the future Internet cannot ignore developments in copyright. It is often the case as Mueller states that "[t]o govern copyright and trademark in the digital world is

to govern the Internet”. Copyright enforcement efforts seek to regain control over the exploitation of copyrighted works, but reach much further. Indeed graduated response tips the copyright balance. It encourages widespread surveillance of Internet users, prioritizes copyright interests over fundamental rights and advocates stronger national regulation of the Internet. In this paper, we have argued that the will to control the Internet in graduated response through its “three strikes” and “legal offer” provisions increases uncertainty in our information society. Graduated response negatively impacts individual users, the market place, but more broadly also society and the Internet.

6. References


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